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779448—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 602

MEYER GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 470–478) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 8, 1947 (R. 469), and a petition for rehearing (R. 479–493) was denied on January 19, 1948 (R. 495). The petition for a writ of certiorari was filed on February 17, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether it was reversible error to try petitioner and two codefendants on charges of conspiracy to violate the National Stolen Property Act and of a substantive violation thereof without the presence of two other codefendants who were in the custody of state officials who refused to deliver them for trial in the federal district court pursuant to a writ of habeas corpus ad prosequendum issued by that court.

2. Whether the trial court erred in submitting to the jury the issue of petitioner's guilt on the substantive count and in imposing a separate sentence on that count.

3. Whether there was sufficient evidence to support a finding that the stolen property transported from Detroit to Chicago on September 13, 1940, had a value of $5,000 or more.

4. Whether the imposition of the maximum sentence on each of the two counts amounted to "cruel and unusual punishment."

STATUTE INVOLVED

The National Stolen Property Act, as amended, 48 Stat. 794, 53 Stat. 1178, provides in pertinent part:

> Sec. 3 [18 U. S. C. 415]. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the

value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *.

Sec. 7 [18 U. S. C. 418a]. If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

STATEMENT

On September 11, 1943, in the District Court for the Eastern District of Michigan, petitioner was jointly indicted with Herman Frank Banning, Bernard Sidran, Howard Julian Graves, Abe Zussman and Bernard F. Gridley for violation of the National Stolen Property Act and for conspiracy to commit offenses under that Act (R. 1–6).

Banning pleaded guilty (R. 162). Petitioner, Zussman and Gridley pleaded not guilty (R. 7–8). Sidran and Graves were at the time incarcerated in the Ohio State Penitentiary, but, pursuant to writ of habeas corpus ad prosequendum issued by the district court. they were produced by the Ohio

officials and arraigned on February 28, 1944. Pleas of not guilty were entered on their behalf (Pet. 4–5).[1]

The trial was held in May 1946 (R. 48). At that time Sidran and Graves were still confined in the Ohio State Penitentiary and the warden of that institution refused to deliver them to the custody of the United States pursuant to a second writ of habeas corpus ad prosequendum issued by the district court (R. 52). The trial proceeded without them.

At the close of the evidence, the trial court dismissed the action as to Gridley (R. 410). The jury returned verdicts of guilty against Zussman and petitioner on both counts (R. 48). Petitioner was sentenced to imprisonment for ten years and fined $10,000 on each count, the terms to run consecutively (R. 50–51). On appeal, the circuit court of appeals affirmed petitioner's conviction (R. 469).

The first count of the indictment charged a conspiracy from January 1, 1940, through May 1, 1941, to transport stolen jewelry valued at $5,000 or more from various points in the United States to Chicago, Illinois (R. 1–5). Banning, the chief

[1] This fact does not appear in the record before this Court. The facts as to the proceedings against Sidran and Graves appear in connection with a motion for remand to the district court made by petitioner in the course of the circuit court of appeals proceeding, referred to by petitioner (Pet. 6).

witness at the trial,[2] testified that he met petitioner in 1935, at which time petitioner advanced money to be used by Banning and his associates, including Graves, for expenses in connection with trips made for the purpose of stealing jewelry (R. 102–103). On other occasions thereafter petitioner advanced funds to Banning and Graves for such expenses (R. 116). Over a period of years prior to 1941, Banning and several associates engaged in approximately twenty-five jewel robberies (R. 76, 197), several of which were described by Banning at the trial (e. g., R. 103, 109, 111, 115, 117, 120, 121, 130, 136, 144). The jewelry stolen on these occasions was transported to Illinois, usually Chicago, where it was sold to petitioner (R. 106, 110, 114, 116, 118, 121, 134, 141, 145). Banning testified that he and his colleagues always sold the jewelry they stole to petitioner (R. 86–87). In buying such jewelry, petitioner knew it was stolen, and the facts concerning the thefts (R. 147). The court below has described the pattern of the thefts as follows (R. 471–472):[3]

> The method which Banning and his confederates followed in the robberies was to hunt for and get on the track of some jewelry salesman whom they would follow from

[2] Banning's testimony was corroborated in many respects. Cf. opinion of the court below, R. 474–476.

[3] Petitioner has not questioned the court's statement of facts.

> place to place and from city to city. They would ascertain whether this salesman carried his samples or wares in a trunk or on his person. If on his person, they followed him until they were able to hold him up and take the jewelry. If a jewelry trunk was used, they watched the expressman who was conveying the trunk to or from the station and would either steal it at a time when the expressman was occupied, or hold him up at the point of a pistol and take the trunk. Sometimes they followed the automobiles of jewelry salesmen, blocked the road, forced them to stop, and robbed them.

The second count of the indictment charged the transportation of stolen jewelry of a value of more than $5,000 from Detroit, Michigan, to Chicago, Illinois (R. 6). Pursuant to agreement, on September 7, 1940 (R. 72), Banning, Sidran and Graves went from Chicago to Detroit in search of a jewelry salesman to rob (R. 75–76). They found one on the streets of Detroit (R. 79) and followed him to his room in the Book-Cadillac Hotel (R. 79–80). It was then decided to include another person, defendant Zussman, in the transaction for the purpose of securing a key to the jewelry salesman's hotel room (R. 80). On September 13, 1940, Zussman secured the key from Gridley, a bellboy in the hotel (R. 80–81). Sidran, Graves and Banning then entered the room by means of the key and stole two sample cases

and a brief case containing jewelry (R. 81–82). They and Zussman were all armed (R. 82–83). They separated outside the hotel but later all met at Sidran's home in Detroit (R. 83), where they transferred the jewelry from the two sample cases to the brief case (R. 84). Later they burned the sample cases containing the cardboards on which the jewelry had been mounted on a country road on the outskirts of Detroit (R. 89). Several hours later the fire was reported to the fire department (R. 285). Policemen and firemen who went to the scene of the fire found the burning sample cases and some small pieces of jewelry (R. 285–289). By agreement among the thieves (R. 86), Graves took the stolen jewelry from Detroit to Chicago, and the other three proceeded to Chicago by another automobile (R. 89). They met in Chicago the next morning, when the jewelry was shown and sold to petitioner by Banning, Sidran and Graves in Banning's hotel room (R. 91–92).

ARGUMENT

1. Petitioner urges that the entire trial was unfair because his codefendants Graves and Sidran were not present.

At the opening of the trial on May 6, 1946, before the jury was drawn, the attorney for the Government stated that Sidran and Graves were incarcerated in the Ohio State Penitentiary, and that on petition of the prosecution the United

States District Court had issued a writ of habeas corpus ad prosequendum to the warden of the Ohio State Penitentiary, but that the state official had refused to deliver them up for trial in the present proceeding (R. 52, 478). No objection to proceeding with the trial was made by petitioner at that time or at any other point in the course of the trial.[4] It was not until March 1947, when the case was pending in the circuit court of appeals, that petitioner raised any question as to the procedure followed. At that time he filed a motion to suspend the appellate proceedings and to remand the case to the district court for the purpose of entertaining a motion for new trial (Pet. 6). The circuit court of appeals denied the motion. Petitioner does not seek to have the denial of this motion reviewed; nor has he presented to this Court any facts on which such review could be had.

Although petitioner alleges that Sidran and Graves would have testified in refutation of Banning had they been present at the trial (Pet. 6, 17), we submit that, since they were defendants,

[4] The trial had been set for February 6, 1946, and prior thereto, on January 23, the Government had secured a writ for the production of Graves and Sidran. The Ohio officials declined to produce them and the trial was postponed (see Pet. 15). There is no indication that petitioner made any effort to interview the prisoners or secure their affidavits or depositions in the meantime. Apparently, not until March 1947, while the appeal was pending, was any attempt made to interview Graves and Sidran (see Pet. 17).

there is no assurance, or even probability, that they would have taken the stand.[5] None of the three defendants who were tried did take the stand, nor did they present any other evidence in their defense. Although Banning was the chief witness at the trial, as the court below pointed out (R. 474–476), his testimony was corroborated in a great many respects. It is evident, therefore, that the trial court in no way erred in proceeding with the trial without the presence of Sidran and Graves, particularly in the absence of any objection by petitioner.

As the circuit court of appeals pointed out in its opinion, the Government did everything within its power to secure the presence of Sidran and Graves at the trial (R. 478). Twice writs of habeas corpus ad prosequendum were secured (Pet. 4–5). There was no legal procedure available for compelling the officers of the State of Ohio to honor the second writ since the transfer of prisoners between federal and state custody is a matter simply of comity. *Ponzi* v. *Fessenden*, 258 U. S. 254.

[5] In affidavits attached to the motion for a remand filed in the circuit court of appeals, Graves and Sidran stated that had they been present at the trial they would have testified in contradiction of Banning (see Pet. 17). The affidavits, however, were executed about ten months after the trial, and obviously have little probative value. The circuit court of appeals in denying the motion for a remand had before it the motion and all the papers attached.

Petitioner has suggested that the prosecution might have sought to use the machinery established under the federal removal statute* (Pet. 7–8, 18–21). That statute, however, on its face, would have been available only if the defendants were made amenable to the process of the federal district court in Ohio. It, of course, makes no provision for release of persons from state to federal custody. It therefore would not have obviated the difficulty encountered in the use of a writ of habeas corpus and prosequendum.

2. Petitioner argues (Pet. 10, 24–25) that since he was not shown to have had any direct, personal participation, except as a "fence", in the substantive offense, he could not be held responsible as a principal to that crime. He does not, however, question the sufficiency of the evidence to sustain his conviction for conspiracy. And there can be no doubt that the substantive offense was committed by the co-conspirators in furtherance of the conspiracy. The factual details of the offense (R. 72–94) were entirely similar to those of numerous others testified to by Banning. This offense fell

* "* * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had." 18 U. S. C. 591. See also Rule 40 of the present Federal Rules of Criminal Procedure governing removal.

exactly within the long established pattern of the conspirators described by the court below (R. 471–472, quoted *supra*, pp. 5–6). In view of the extensive history of similar acts in the course of the conspiracy, this offense was clearly one which petitioner could reasonably have foreseen "as a necessary or natural consequence of the unlawful agreement." *Pinkerton* v. *United States*, 328 U. S. 640, 648 (Cf. Pet. 25).

Petitioner's argument is foreclosed by the *Pinkerton* decision, where it was held, on facts not differing in any material respect from those in the instant case, that a member of a conspiracy who has not withdrawn therefrom is guilty of all offenses committed by any member of the conspiracy in furtherance of the illegal agreement (pp. 646–647). The Court in that case (at p. 643) expressly rejected the contention made here by petitioner that conviction under such circumstances of both the conspiracy and the substantive offense constitutes double jeopardy.

3. The undisputed evidence was sufficient to warrant a finding that the stolen property had a value of $5,000 or more. The cost of the jewelry to the robbery victim, a wholesale seller of jewelry, was $6,190.50 (R. 211). The company's insurance claim for $6,190.50 was settled for $4,600 (R. 62, 210). Donald B. Sherwood, the representative of the insurance company which paid this claim, testified that claims were paid on the basis of the actual cost of the goods stolen, or of

their inventory value, whichever was lower. He further testified that it was customary in the jewelry business to carry property in inventory at its actual cost at first, later reducing it, for inventory accounting purposes, below that cost. (R. 63.) Thus, the $4,600 paid by the insurance company in settlement of the claim undoubtedly represented at most the fictitious inventory value of the jewelry (R. 65), which was below the actual cost to the wholesaler. In determining the wholesale price to retailers, i. e., the wholesale market value, of the goods, it obviously would be necessary to add to the cost thereof a mark-up to cover overhead and other costs, plus a margin of profit.[7] Thus it is clear that even the wholesale market value of the jewelry here involved was substantially more than $5,000.

However, as held by the Circuit Court of Appeals for the Eighth Circuit, the proper standard of value for the purposes of the National Stolen Property Act is, in a case like the present one, the retail market value. *Husten* v. *United States,* 95 F. 2d 168, 171, cited by the court below (R. 474). Herbert Ollendorf, who has been in the wholesale jewelry business for fifty years (R. 205) and one of whose duties was to prescribe suggested retail prices for the jewelry sold by his company (R.

[7] Nettie Zipper, who had been employed in the jewelry business for about thirty years (R. 336), testified that the wholesale company for which she worked added a mark-up of about 33⅓% to its costs in selling to retailers (R. 337).

212), testified that the retail value of the jewelry carried by his brother Walter on the trip in question was approximately $15,000 (R. 222).[8] It is clear, therefore, that the value of this property was well over $5,000.

Petitioner, however, contends (Pet. 8–9) that it was not shown that all the jewelry which Walter Ollendorf had taken with him on his trip from New York was stolen in Detroit, or that the value of the stolen property transported from Detroit to Chicago was $5,000 or more, since some of the stolen jewelry had been abandoned and burned by the thieves in the outskirts of Detroit (R. 285, 287, 288). The jury, however, was warranted in believing that all the jewelry which Walter Ollendorf had originally taken with him was stolen. This jewelry was used by him as samples, from which orders were taken, and was not to be sold by him (R. 210, 218–219).

The jury also could reasonably infer that only an insignificant amount of the jewelry stolen was burned by the thieves. Banning testified that after the theft the thieves went to Sidran's home in Detroit (R. 83–84):

> We went down to the basement and opened up the merchandise on a beer table. * * * we opened the stuff up on a table and took them out of the bags and

[8] Witnesses long acquainted or associated with the jewelry business testified to retail markups over wholesale prices of from 50% to 100% (R. 66–67, 337), and to margins of about 100% between retail and manufacturers' prices (R. 351, 362).

put it in this brief case. Those were the three bags taken from the room in the Book-Cadillac. The bags contained mostly watch cases and pendants and maybe a few pins, as I recall it. * * * They were attached to the cardboard. They were bound around a cardboard display—the way they carry them in the bag. We disassembled it from the display cards. The jewelry was put into a brief case and the display cards were all put back in the two empty cases. The brief case was one of those three cases that belonged to this man Ollendorf.

He testified as follows concerning the two sample cases (R. 89):

* * * Then we continued back to the highway and on out about two miles, and took these two bags, stopped at the station, bought a gallon of gasoline, took these two bags out of the car, and walked down maybe 200 yards down a country road, and set them afire in the road. * * * Those were the two bags we had taken out of the Book-Cadillac Hotel. We drove on into Chicago.

The COURT: Are those the two bags that are supposed to have contained the jewels when they took them from the hotel?

* * * * *

The WITNESS. That is, two of the three bags. The two bags had all the cardboard and different things that we didn't want, we put in these two bags and burned it all.

The COURT. Who took the other bag?

> The WITNESS. Graves took the bag of jewelry.
>
> The COURT. You took all the jewelry and put it in one bag and burned these bags, * * *.

And in discussing his meeting with petitioner in Chicago the next day, Banning testified (R. 94):

> The merchandise I had on display in my room in the Southmore Hotel, on the morning of September 14, 1940, when Gordon, myself, Sidron, and Graves were present, was the merchandise I and others had stolen from that room in the Book-Cadillac Hotel on the morning of September 13. * * * It was the merchandise I was discussing as the merchandise that had been taken from the hotel room when I was talking to Gordon.

The trial judge specifically charged the jury that one of the essentials of the crime was that the stolen property transported must have a value of at least $5,000 (R. 439–440).

As we have seen, the value of the stolen property was substantially more than $5,000. There is no reason to believe that the thieves had any intention of abandoning any of the stolen jewelry. The natural and most reasonable inference from the testimony is that in removing the apparently great many items from the cardboard to which they were attached, the thieves overlooked a few items. To assume that any substantial quantity of the jewelry was neglected would be contrary

to ordinary experience. Further, it is natural to assume that had any significant amount of jewelry been left in the sample cases and burned, that fact would have been noted by the policemen and firemen who went to the fire. However, it appears that only a small amount of jewelry was found at the fire. Policeman Walter Zink, for example, testified that at the fire they found "quite a few trays, like watch trays, and some small pieces of jewelry" (R. 287).

4. Petitioner's contention that the imposition of the maximum sentence for each of the crimes committed amounts to cruel and unusual punishment does not warrant review by this Court. It is not argued that the statute is unconstitutional because of the punishment prescribed therein; nor is it claimed that the sentences imposed were not authorized by the statute. In view of these facts, the action of the trial court in imposing sentence is not open to review. As stated by the Circuit Court of Appeals for the Fourth Circuit in *Tincher* v. *United States,* 11 F. 2d 18, 21, certiorari denied, 271 U. S. 664:

> The sentences imposed were within the limit prescribed by the statute; and it is well settled that in such case the action of the trial judge will not be reviewed on appeal, except in case of gross or palpable abuse, which does not exist here. The judge who tries the case and hears the testimony is the best, as he is the sole judge

of the merits, and if he acts within the boundaries prescribed by law his decision is final and unreviewable in an appellate court.

Cf. *United States* v. *Sorcey*, 151 F. 2d 899, 903 (C. C. A. 7), certiorari denied, 327 U. S. 794; *Russell* v. *United States*, 119 F. 2d 686, 689 (C. C. A. 8); *Moore* v. *Aderhold*, 108 F. 2d 729, 732 (C. C. A. 10); *Bailey* v. *United States*, 74 F. 2d 451, 453 (C. C. A. 10).

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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